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UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

**Order 2002-10-6**

Issued by the Department of Transportation  
on the **3rd day of October, 2002**

**Served: October 3, 2002**

**U.S.-U.K. Alliance Case**

**Docket OST-2001-11029**

**ORDER**

**Summary**

In this Order, we are amending a condition we attached, in Order 2002-4-4, to our grant of approval and antitrust immunity for alliance agreements between and among United Air Lines, Inc., British Midland Airways Limited d/b/a bmi British Midland, and various affiliates of these carriers. Our action in that order currently makes our approval and antitrust immunity subject to the condition (among others) that the United States achieve by October 4, 2002, an Open Skies agreement with the United Kingdom that meets U.S. aviation policy objectives. Our action in this order extends that October 4 deadline through December 31, 2002. In taking this action, we are granting in part a Motion filed on September 13, 2002, by the conditionally immunized carriers, requesting that we extend this deadline.

**Background**

By Order 2002-4-4, issued April 4, 2002, the Department granted final approval and antitrust immunity for alliance agreements between and among United Air Lines, Inc. (United), British Midland Airways Limited d/b/a bmi British Midland (bmi), Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa AG, and Scandinavian Airlines System, and their wholly-owned affiliates (hereafter collectively referred to as "United/bmi"), subject to a number of conditions, including the condition that the United States achieve, within six months from the issue date of that order, an Open Skies aviation agreement with the United Kingdom that meets U.S. aviation policy objectives. We also granted United/bmi the necessary exemption authority

and statements of authorization to implement their proposed alliance/code-share arrangements.<sup>1</sup>

In taking this action, we found, among other things, that our decision in this case granting United/bmi's request, subject to conditions, could help the United States achieve an Open Skies agreement with the United Kingdom; and that replacing the current restrictive U.S.-U.K. Bermuda 2 agreement with an Open Skies agreement would provide important public benefits.<sup>2</sup>

### **Motion of United/bmi**

On September 13, 2002, United/bmi filed a Motion requesting that we amend Order 2002-4-4, by extending the deadline we set in that order for the achievement of Open Skies with the United Kingdom for an additional six months, through April 4, 2003.<sup>3</sup> In support of their request, United/bmi state that in the time since we issued Order 2002-4-4, nothing has happened to draw into question any of the Department's findings in that order; that the United States has continued to pursue with the United Kingdom fundamental liberalization of the U.S.-U.K. agreement; and that the continued approval of the United/bmi alliance can be helpful to that ongoing effort. Finally, United/bmi state that our failure to extend the deadline would mean that on October 4 they would lose the authority granted in Order 2002-4-4, and thus the ability to implement their proposed services in the market once the Open Skies prerequisite is satisfied, and that they would therefore need to undergo the burdensome process of reapplying to the Department for this authority at that future date.

### **Responsive Pleadings**

On September 24, 2002, Continental Airlines, Inc. (Continental), and Delta Air Lines, Inc (Delta), filed answers in opposition to United/bmi's Motion. On September 27, 2002, United/bmi filed a reply.

Continental and Delta both state that the United Kingdom has shown that it is not interested in Open Skies, that the Department's action granting United/bmi conditional approval and antitrust immunity has created no meaningful incentive for the United Kingdom to conclude an Open Skies agreement with the United States, and that the Department should confirm its commitment to Open Skies by refusing to grant the deadline extension sought by United/bmi.

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<sup>1</sup> In that order, we also (1) granted motions of American Airlines, Inc. and British Airways Plc to dismiss their joint applications seeking approval of and antitrust immunity for their alliance agreement, and to dismiss their requests to engage in reciprocal code-sharing under that alliance agreement; and (2) denied a motion of Continental Airlines, Inc., Delta Airlines, Inc., and Northwest Airlines, Inc. to dismiss the applications of United/bmi in Docket OST-2001-11029.

<sup>2</sup> By Order 2002-6-2, in this Docket, we also dismissed a petition, filed by Continental Airlines, Inc., for reconsideration of our action in Order 2002-4-4.

<sup>3</sup> See ordering paragraph 4 of Order 2002-4-4.

Continental states that United/bmi's extension requests could prove endless, and that, in a rapidly changing aviation world, the record on which Department based its action in Order 2002-4-4 is growing very stale, it likely will change significantly when and if Open Skies is concluded, and any further consideration of the United/bmi request should require a new application by the carriers after any Open Skies agreement is reached.

Delta further states that the United/bmi request amounts to an untimely petition for reconsideration of Order 2002-4-4; and that the United States needs to send a clear signal that immunity for a U.K. carrier (bmi) is unavailable in the current circumstances.

United/bmi state that neither Continental nor Delta refutes either the conclusions the Department made in initially granting United/bmi their authority in Order 2002-4-4 or the continuing validity of those conclusions; that although Continental believes the record in this proceeding is stale, it offers no specific support for that assertion; and that there will be no need for another proceeding to review competition issues once Open Skies with the United Kingdom is achieved. United/bmi further state that there has been some progress in U.S.-U.K. negotiations, and that the Department can therefore conclude that the existence of the conditional United/bmi approval and immunity has had the desired effect on U.K. policy. United/bmi state that the momentum that now exists would be lost should the October 4 deadline not be extended.

### **Decision**

We have decided to grant, in part, United/bmi's Motion, and to extend through December 31, 2002, the date on which the authority we granted United/bmi in Order 2002-4-4 will terminate unless the United States achieves an Open Skies agreement with the United Kingdom that meets U.S. aviation policy interests. We will deny the request of United/bmi for an extension of the deadline beyond that date.

We originally imposed the six-month condition, on our own initiative, in the interest of furthering our goal of reaching an Open Skies agreement with the United Kingdom that meets U.S. aviation policy objectives. While we have not yet achieved that result, the process remains ongoing. Indeed, the United States recently expressly communicated to the Government of the United Kingdom the U.S. Government's continued interest in reaching Open Skies.<sup>4</sup>

Under these circumstances, we believe that the public interest factors on which we based our action in Order 2002-4-4 remain valid, and that the conditional approval and antitrust

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<sup>4</sup> See letter dated September 9, 2002, from John R. Byerly, Deputy Assistant Secretary of State for Transportation Affairs, to Anthony T. Baker, Director, International Aviation Negotiations, U.K. Department for Transport, Local Government, and the Regions. A copy of this letter has been placed in Docket OST-2001-11029.

immunity we granted United/bmi should remain in effect until December 31, 2002, while negotiating efforts with the United Kingdom continue.<sup>5</sup>

With respect to the concern raised by Continental that the record in this case is stale, and that we should for this reason withhold any extension of the conditional approval and antitrust immunity we granted to United/bmi, we see nothing in the less-than-three-month extension we are granting here that would cause us to question the continuing validity of the record in this proceeding as a basis for decision.

**ACCORDINGLY,**

1. We grant, in part, the September 13, 2002, Motion of United Air Lines, Inc., British Midland Airways Limited d/b/a bmi British Midland, Austrian Airlines Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa AG, and Scandinavian Airlines System, and their wholly-owned affiliates, to amend Order 2002-4-4;

2. We amend the second sentence of ordering paragraph 4 of Order 2002-4-4 to read as follows:

“The approval and grant of immunity is subject to the conditions that the United States achieves, no later than December 31, 2002, an Open Skies agreement with the United Kingdom that meets U.S. aviation policy objectives, and that the antitrust immunity will not cover any activities of the Joint Applicants as owners or marketers of computer reservation systems businesses;”;

3. To the extent not granted, we deny the September 13, 2002, Motion filed by United/bmi in this Docket; and

4. We will serve a copy of this order on the parties to this proceeding; the Ambassador of the United Kingdom of Great Britain and Northern Ireland in Washington, D.C.; the Federal Aviation Administration; and the Department of State.

By:

READ C. VAN DE WATER  
Assistant Secretary for Aviation  
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:*  
[http://dms.dot.gov/reports/reports\\_aviation.asp](http://dms.dot.gov/reports/reports_aviation.asp)

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<sup>5</sup> While United/bmi requested an extension of the deadline for a longer term, namely six months, they provided no specific justification for a six-month term.